REFERENCES REQUIRED BY RULES OF THIS COURT.

Opinion below. ***National Labor Relations Board vs. J. H. Allison & Co.,*** 165 Fed. (2d) 766 (R. 127-138).

Jurisdictional Authority. Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925.

Date of Judgment. January 26, 1948 (R. 127). Time for filing petition for certiorari extended by Reed, *J.*, until June 5, 1948.

Nature of the case, Rulings, etc. During mid-term of the union contract providing only for minimum wages, but no maximum, Allison & Company granted non-negotiated merit wage increases to employees whom they felt to be deserving. This was in line with a policy of many years standing; and no objection had ever been made to this by the union. On this occasion the union requested a list of the names of those to whom merit increases had been given, and the company declined to give this list. The union then filed a charge, accusing the company of refusing to bargain under the terms of the National Labor Relations Act. A complaint was issued. After the issuance of the complaint, and before the hearing, the union and the company negotiated a new contract. In negotiating the new contract, the union requested the company to include a clause giving the union the right to bargain as to merit wage increases. When the company declined to accede to this request, which was made only once, the union withdrew the request, and a new contract was made that was similar to the old one.

The trial examiner held that the company was guilty in (a) refusing to furnish the list when it was requested, and (b) refusing to include the requested clause in the new contract that was negotiated. The National Labor Relations Board stated it was not necessary to determine whether the refusal to furnish the list in the middle of the contract

year constituted a violation of the Act, but ruled that the company did violate the law in failing "during the formulation of the 1946 contract to negotiate concerning merit wage increases * * * and * * * continuing refusal to furnish to the union information concerning merit wage increases which had been granted * * *."

The C. C. A. (6th Circuit) *held* that the granting of merit increases *per se* constituted a violation of the National Labor Relations Act and that the company violated the Act in (a) refusing to give the union a list at the time it was requested, and (b) refusing to bargain as to merit wage increases in the formulation of the 1946 contract.

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In the

Supreme Court of the United States

OCTOBER TERM 1947.

No. .....

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Circuit Court of Appeals For the Sixth Circuit.

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered on January 26, 1948, in the case of *National Labor Relations Board vs. J. H. Allison & Company*, 165 Fed. (2d) 766, granting an order of enforcement to the National Labor Relations Board. Orders granting forty days additional time for filing this petition have heretofore been entered by this Court, and this application for a writ is therefore timely.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals appears in the record beginning at page 127, and the opinion of the National Labor Relations Board appears in the record beginning at page 33.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

This case presents important questions of procedural law as well as of substantive law. The basic questions presented by the case are as follows:

(1) Can the Circuit Court of Appeals grant an enforcement order to the National Labor Relations Board on grounds other than those cited by the National Labor Relations Board in its findings?

(2) Under the National Labor Relations Act, can an employer be found guilty of an unfair labor practice on the basis of facts which occurred after the filing of the charge and the issuance of the complaint, but before the hearing of the case?

(3) Is an employer guilty of refusal to bargain with a union when, in the negotiation of a contract, the union makes a demand to which the employer declines to assent, and the union then withdraws the demand and proceeds to execute a contract?

(4) Is it a violation of the National Labor Relations Act for an employer to grant *ex parte* merit wage increases above the contractual minimum to employees, where such increases do not effect any change in the existing contractual wage agreement, and where there is no negotiating or bargaining as to such increases?

SUMMARY STATEMENT.

On December 10, 1945, the National Labor Relations Board on the basis of a charge theretofore filed by a union of petitioner company's employees issued a complaint against the petitioner company asserting that "on May 2, 1945, and at all times thereafter, the company has refused

to bargain collectively with the union with respect to merit increases in rates of pay and wages." (R. 13)

The company denied this complaint in its answer and a hearing was held before a trial examiner of the Board on January 21, 1946. (Meanwhile, in the early part of January, 1946—after the complaint had issued, and before the hearing was held—a new contract between the company and the union of its employees was negotiated, this contract being referred to throughout as the 1946 contract.)

The trial examiner filed an intermediate report in which he found that on May 2, 1945, and at all times thereafter, the company had refused to bargain with the union as charged. (R. 24)

The basic facts established in the record are as follows:

The petitioner company has had contractual relations with the union involved since 1941. The 1945 contract—a one-year contract, dated January 1945—contained a union shop provision, requiring all employees in the bargaining unit to be members of the union.

In negotiating the wage scale in that contract, the union merely bargained for a *minimum wage, no maximum wage being established by such negotiations, or set out in the contract.* This same procedure characterizes all contracts had before—and since—between the company and the union.

For a period of many years—(for more than sixteen years, according to the union president)—the company had been accustomed to giving employees what were known as "merit wage increases," on an *ex parte* basis. Whenever the company felt that a certain employee was doing a particularly good job, the company would, *without notice to the employee or the union,* and without discussion with anyone, grant the particular employee a wage increase. The first that the employee knew about getting the increase was when he received his pay check. There was no element of negotiating or bargaining in connection with such an increase, although any employee could get the union com-

mittee and come in and undertake to negotiate an increase for himself. That, however, would constitute a negotiated increase.

In the summer of 1944 the union undertook to secure a general wage increase through the medium of the War Labor Board, which at that time had charge of wage stabilization. The hearing dragged on for many months, and was finally terminated in the spring of 1945, when the War Labor Board refused to grant the increase asked by the union. Meanwhile, during the pendency of this hearing, the company had given no merit increases at all—preferring to await the decision of the War Labor Board. After the War Labor Board made its ruling, the company proceeded to grant a number of merit increases which it would have granted during the preceding several months, but for the pendency of the case. These merit increases were granted several months after the negotiation of the 1945 contract, at a time when no contract was in negotiation, and at a time when there were no negotiations going on as to wage increases (the recent negotiation having been terminated by the order of the War Labor Board, and no notice having been given as to the institution of *new* negotiations).

The union then came to the company and demanded that the company furnish it with a list of those employees who had been given merit increases, the list to show the amount of increase in each instance.

This the company declined to do.

On the basis of these facts, the charge of refusal to bargain was filed, and the complaint subsequently issued.

The only thing sought by the union was the furnishing of the list of those employees who had been granted merit wage increases. It is most important to bear this in mind. There was no demand, request, or any other attempt on the part of the union to get the company to *bargain* as to these merit wage increases. *There was merely a request that the list be furnished.*

After the complaint issued and prior to the hearing before the trial examiner, the company and the union met to negotiate the 1946 contract. In the course of these negotiations the union requested of the company that a clause be included in the contract that would give the union the right to bargain with the company on merit increases. The company demurred to this proposal, and the union thereupon abandoned it and went on to execute the 1946 contract which contained no provisions for bargaining as to merit increases. *There was no request during the formulation of this contract for the list hereinbefore mentioned, and no effort to bargain as to merit increases, save the single request for the inclusion of the clause mentioned.*

The foregoing facts are undisputed.

THE FINDING OF THE TRIAL EXAMINER.

On the basis of these facts, the trial examiner made a finding to the effect that the company had, by (1) refusing to furnish the list in May 1945, and by (2) refusing to include a clause making merit increases the subject of bargaining in the 1946 contract, refused to bargain collectively with the union.* It should be borne in mind that he based his ruling on both grounds—Ground One and Ground Two—and the facts of Ground Two occurred in the early part of January, 1946, *after the complaint had issued, but before the hearing.*

THE FINDING OF THE NATIONAL LABOR RELATIONS BOARD.

The National Labor Relations Board itself, on August 26, 1946, duly stated its findings of fact and conclusions of law. This was done in a split decision. Board members Houston and Herzog constituted the majority, and Gerard Reilly constituted the dissenting minority. The majority opinion of the Board held that it was

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* We will refer to these two bases as Grounds One and Two, respectively.

> "unnecessary to determine whether the respondent was under an obligation to bargain concerning merit increases during the term of the 1945 contract which the union had entered into without provision therein for merit increases under the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years." (R. 34)

Thus the Board pretermitted Ground One. The majority opinion based its finding of a refusal to bargain upon the petitioner company's

> "failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper subject of collective bargaining, and upon the respondent's continuing refusal to furnish to the Union information concerning merit wage increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases." (R. 35)

In other words, Ground Two was definitely the basis of the Board's ruling, and Ground One was simply mentioned, but not discussed nor passed upon.

The Board ruled that the company was guilty of a refusal to bargain in the formulation of the 1946 contract. They state two particulars in which there was such a refusal. One particular (for which there is basis in the Record) is the refusal to include the clause which the union requested. The other particular (for which there is no basis in the Record) is that the company declined to furnish information as to merit wage increases.*

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* There is not one scintilla of evidence in the Record that during the formulation of the 1946 contract the union requested "information concerning merit increases." It does not appear that the list which had been requested back in May, 1945, was then requested. Nor did the union seek at that time to bargain as to merit wage increases. The only mention made of merit increases was when the union proposed that a clause be included in the contract, which would give the union the right to bargain as to merit wage increases.

Board member Reilly held that in so far as what took place in May, 1945 was concerned (that is, Ground One), the parties were not then negotiating for a contract and it was not incumbent upon the respondent to disclose information concerning merit wage increases at that time. (This finding is not contradicted by the majority opinion, *supra.*) The dissenting opinion went on to say that since the contract that was then in force contained a minimum wage scale, but was silent as to maximum wages, the Act did not require an employer to furnish information concerning certain merit wage increases which it had granted.

In so far as concerned the company's refusal to bargain by refusing to include the requested clause in the 1946 contract, Board member Reilly pointedly asserted that

> "There is no obligation under Section 8(5) for an employer to agree to anything. Consequently, it cannot be said that an employer failed in his duty under the Act when he 'traded off' a demand on one issue for a substantial concession on another." (R. 39)

On the basis of the majority decision and the subsequent order, the Board filed proceedings with the Sixth Circuit Court of Appeals to obtain an order of enforcement.

THE FINDING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals heard argument on the case and on January 26, 1948, a decision was rendered. Again—as in the case of the Board itself—it was a split decision. Circuit Judges Martin and Allen concurred in the majority opinion, while Circuit Judge Simons filed a vigorous dissent.

In the majority opinion, the Court ruled that

> "We think the logical deduction to be drawn from the opinions of the Supreme Court is that by virtue of the NLRA the obligation of the employer to bargain collectively with representatives of its employees with

> respect to wages, hours and working conditions, includes the duty to bargain with such representatives concerning individual merit wage increases." (R. 132.)

The Court goes on to point out that

> "The refusal of respondent, during the formulation of the 1946 contract, to negotiate with the union concerning merit wage increases and to furnish information upon the subject so that the union could adequately represent the employees, was declared to be the basis of the Board's finding that the respondent had refused to bargain within the meaning of Section 8(5) of the Act."* (R. 130.)

Despite the fact that Ground Two was the sole basis of the finding by the Board, the Court went beyond that and held, as heretofore indicated, *that merit increases had to be bargained with the union, regardless of contractual provisions*, and—apparently—without regard to the *seasonableness* of the demand. In other words, at no time—and regardless of contract provisions—could the company grant merit increases without first bargaining with respect thereto with the union. Thus, in effect, the Court sustains Ground One as well as Ground Two!

The Court frankly conceded that none of the decisions which it cited was directly in point, but felt that all unilateral action in so far as this particular employer was concerned was illegal, and therefore granted the order of enforcement.

Circuit Judge Simons, in his dissent, acknowledged that an employer could not "unilaterally bargain" with respect to wages. However, he pointed out that "merit increases as such are neither the result of negotiation nor contract." He conceded—as has the company—that if

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* As we have previously pointed out, the record does not show a *refusal to furnish information* during the formulation of the 1946 contract, nor does it show a refusal to negotiate concerning merit wage increases.

they were a part of a plan to undermine the union, they would be illegal. He states, however, that

> "In the instant case, there is no finding that the merit increases were in pursuance of such plan, no finding that they did, in fact, undermine the union, no evidence to sustain such findings if they had been made, and the history of labor management relations in the respondent's plant repels any inference that its merit increases had either such purpose or effect." (R. 137.)

In so far as the company's refusal to bargain in the formulation of the 1946 contract was concerned—and it will be remembered that this (Ground Two) was the sole basis for the Board's holding that the company was guilty of an unfair labor practice—the dissenting opinion points out that

> "The law compels bargaining. It does not and may not compel agreement. In the present case, the union sought to bargain upon the subject of merit increases, *but abandoned its demand and freely entered upon an agreement still in effect when the order was made which contained no reference to merit increases or maximum compensation. The union should, as the employer must, stand by its bargain. The Allison Company was not guilty of an unfair labor practice and enforcement should be denied to the Board's order." (R. 138.)

REASONS FOR GRANTING THE PETITION.

The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court.

1. We insist that since the National Labor Relations Board's decision was based solely on the company's conduct in the formulation of the 1946 contract (Ground Two), the sole question to be decided by the Court *was whether*

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*But only to the extent of the inclusion of the proposed clause!

the Board's conclusion in that particular was proper or not. Instead of confining itself to this question, the Court went far beyond the holding of the National Labor Relations Board, and ruled the company guilty on the basis of Ground One as well as Ground Two! This is clearly *ultra vires* on the part of the Court.

2. The Court and the Board, by ruling Ground Two as sufficient basis for a finding of an unfair labor practice, found the company guilty of something which did not even exist at the time the charge and complaint issued. This is also illegal.

3. If the only question is whether the company was guilty of a refusal to bargain in the formulation of the 1946 contract, the answer must be in the negative, as pointed out so succinctly by Judge Simons. Ground Two is obviously fallacious.

4. Should it be held, however, that the Court has before it the consideration of the broad question of merit increases, and whether a company can grant a merit increase without negotiating it through the union, then we most respectfully urge that, in the absence of a contractual stipulation to the contrary, and in the absence of evidence that the granting of such *ex parte* merit increases is designed to or is resulting in damage to the principle of collective bargaining as between the employer and the union, an employer is fully justified in granting such *ex parte,* non-negotiated increases.

BRIEF.

While we will not do more than touch on the legal reasoning applicable to the four questions involved in this case, we do wish to point out some of the law which leads us to believe that this petitioner was and is justified in asking the Court to refuse to issue an order of enforcement.

Reason One. It has long been an accepted rule of law that the courts, in considering the actions of the National Labor Relations Board, do not have the power to go beyond the ruling of the Board and substitute their own judgment. Beginning with the case of *NLRB vs. Waterman Steamship Corporation*, decided by this Court in 1940 and reported in 309 U. S. 206, it has been held that the finding of facts is a function of the Board, and not of the courts. In this case, as we have heretofore shown, the Board itself pretermitted the question of whether petitioner was guilty of an unfair labor practice in declining to furnish a list of merit increases in May, 1945, during the middle of the contract year. The Board held that it was not necessary for them to pass on this question.*

The Board went on to hold that they based their finding of an unfair labor practice on petitioner's refusal to include a clause in such contract that would give the union bargaining rights as to merit increases, and also upon the company's refusal at that time to furnish information.

The Court of Appeals, however, went beyond this latter holding, which has been termed Ground Two. The Court picked up Ground One as well—*although it had been pretermitted by the Board.*

We submit that this is *ultra vires* on the part of the Court.

A finding that certain primary facts constitute an unfair labor practice, represents what might be called *a finding of ultimate fact.* See *NLRB vs. Columbian Enameling & Stamping Co.*, 306 U. S. 292.

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* Although this was the sole basis of the charge and complaint!

We can find no indication in any authority on administrative legislation and adjudication—and we have made an exhaustive study of the works of Sir Cecil Carr, James Hart, and the excellent survey by Ernst Freund—which would lend any credence to the validity of the action of the Court of Appeals in undertaking to animate the lifeless corpse of Ground One, which was so effectively slain by the deliberate neglect of the National Labor Relations Board.

We submit that the Circuit Court of Appeals erred in undertaking to find that petitioner was guilty of an unfair labor practice on the basis of Ground One.

Reason Two. The finding of the Labor Board and of the Court that this petitioner was guilty of an unfair labor practice on the basis of facts which occurred not only after the filing of the charge, *but after the issuance of the complaint in this case*, was *ultra vires* and unlawful.

This case originated with the filing of a charge by the union. This charge was based on the fact that in the middle of a contract year the company refused to give the union a list of merit wage increases which the company had made. *The furnishing of this list was the sole question involved.*

Mr. Allen, the International representative of the union, testified that after the company had declined to furnish this list, the union "agreed that we would ask the Board to determine whether or not we should have that information." (R. 57)

The furnishing of this information was the sole issue between the parties.

That this is true is plainly indicated by the statement of a Mr. Brin, who came to see the company on behalf of the Labor Board after the filing of the charge. He stated—and his statement appears on pages 59 and 60 of the record in this cause:

"Because you see this charge is that you didn't give them the names or rates of persons within the Union whose wages had been raised. That's the basis for this charge, that the Company kept away from the Union, by refusing to give to it information regarding the wage rates of its own members. That's the whole basis of this charge, and they claim that that is a failure to bargain."

The trial examiner stated in response to a question as to the perimeter of the hearing, that "the only issue here before us is the issue described in the Complaint issued by the Board, and that would be the only issue that the Board would make any findings on." (R. 60)

Petitioner thereupon concluded that the issue before the Board was that of whether the company should furnish the list that had been requested.

But the Board completely abandoned this issue, and based its finding of a refusal to bargain "upon the respondent's failure during the formulation of the 1946 contract to negotiate concerning wage increases * * * and upon respondent's continuing refusal to furnish to the union information concerning merit increases * * *."

All of these alleged facts occurred after the issuance of the complaint in the case, and while they can be loosely said to come within the scope of the charge, they are radically different from the basis of the charge and from the concept of the case as indicated by the pleadings and statements by the agent of the Board. There was not that degree of reasonable certainty in the notice provided by the pleadings that is called for by our idea of American justice, and we submit that for this reason the Board and Court were in error in their finding of an unfair labor practice based on these facts.

Reason Three. Our third reason is tongued and grooved into our second, and serves to complement it. The alleged facts of Ground Two—which we have asked this

Court to rule out on account of the technicality suggested in our second reason—should also be ruled out because, even had they been properly plead, *there is no factual basis to sustain them.*

As Judge Simons stated in his dissent, "The law compels bargaining. It does not and may not compel agreement." Surely this company cannot be held to have refused to bargain when, *after one request* by the union that this clause be included, and upon the company's statement that it did not wish to include such a clause, the union withdrew its demand and proceeded to execute the contract.

There is no evidence whatever that during the negotiation of the contract the union requested the list that formed the original basis for the filing of the charge. We have repeatedly conceded that such a request would have been reasonable, timely, and proper, and that the company would have been obligated to furnish the information at that time. *But it was not requested.*

We submit that there is no factual evidence on which Ground Two can be sustained as a basis for a finding of an unfair labor practice.

Reason Four. Our fourth reason is that even if the broad question of merit increases as such is to be considered, without reference to the technical questions existing in the case, the Circuit Court of Appeals must be reversed.

We concede, of course, that an employer may not unilaterally bargain with respect to wages.

Not one of these decisions cited by the Circuit Court of Appeals, however, holds or indicates that merit increases may not be granted within the existing wage structure.

The company and the union had a contract which established only minimum wage rates. In other words, the company's contractual liability for wages was met so long

as it paid a minimum wage that had been agreed upon with the union.

Employees, who were already making the minimum, received increases in one of two ways. They either negotiated such increases, through the medium of the union—or, in some instances, the company would give the individuals an *ex parte* and unilateral increase on the basis of good performance, such increases being known as merit increases.

It is the theory of the Board and of the Circuit Court of Appeals that the latter of these two methods of increases is illegal. It is your petitioner's insistence that such a method of increase is not illegal under the existing contract.

We concede that any employee is entitled to bargain, through the union, for the first type of increase which we mentioned,—which we call a "negotiated increase." But we insist that so long as we meet our contractual obligation of paying the minimum wage established by the contract, and by negotiating as to such increases as the union may bring up, we are perfectly free to grant unilateral increases to employees without bargaining negotiation, unless it be made to appear that such is for the purpose or has the effect of undermining or damaging the union, and, as Judge Simons points out in his dissent, there is no proof whatsoever that such is true in this case.

We also concede that the company is obligated to furnish such a list as constituted the basis of the charge in this case at any time when wages are being bargained. Had such a list been demanded when the 1946 contract was being formulated, the company would have been obligated to furnish it. But it was not demanded.

The very decisions cited by the Circuit Court of Appeals show that, although collective bargaining requires an employer to bargain collectively and not individually with his employees, there are still areas untouched by the collectivism—areas in which the employer may deal with his

employee as an individual. We insist that this very clear language of this Honorable Court is plainly intended to cover just such situations as this.

Suppose, for example, that an employer was in the habit of giving certain of his employees a turkey at Christmas time, in recognition of their outstanding service. Suppose that he chose the employees who were to be the recipients of such a gift on a purely unilateral basis. So long as that employer had not contracted away his right to make such gifts, he would be perfectly within his rights in making them. There would be no element of bargaining involved—no negotiation. The employees involved did not know that they were the recipients until they actually received the gift.

We quickly concede that the union could request the company to make this matter a subject of collective bargaining, by including it in the contract. If that were agreeable to the employer and it was included in the contract, then it would indeed be a proper subject of collective bargaining. But if the employer demurred to putting that into the contract, and if the union then withdrew its demand for such a contractual provision—the employer would still be entitled to make these gifts unilaterally, as in the past.

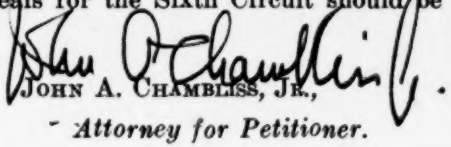
That is exactly what was done in this case.

Of course merit increases can be made the subject of collective bargaining. In many contracts it is stipulated that no merit increases will be awarded without prior consultation with the union. But that is because of the contractual provision, rather than the general law of the land. We earnestly contend that since all contractual and lawful obligations as to bargaining have been met by the petitioner, there was no failure to bargain. The granting of merit increases unilaterally did not constitute a refusal to bargain—(and it is significant that the Labor Board did not hold that it was, nor did the Circuit Court of Ap-

peals, other than by implication!). The refusal to furnish the list, on account of which the original charge was filed, was not a refusal to bargain, coming as it did in the midst of the contract year.

The decision of the Circuit Court of Appeals should be reversed, and the order of enforcement disallowed.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.



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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 69.

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REJOINDER BRIEF OF PETITIONER.

The brief in opposition filed on behalf of the National Labor Relations Board plainly shows the error of appellee and greatly clarifies this case.

The brief contains a most significant misstatement of fact.*

The mistake of fact to which we refer is the frequently repeated statement that during the formulation of the 1946 contract, there was a "continuing refusal to furnish to the union information concerning merit increases which had been granted."

As we pointed out in our original petition, *there is not one scintilla of evidence in the record to sustain this statement.* Opposing counsel cites the opinion of the Circuit Court of Appeals as sustaining this statement, but nowhere cites the record of the original hearing before the trial examiner. The obvious reason for their failure to cite that record is that *such record fails to disclose such a fact.*

The situation reminds one of Alice's "cunning old Fury." The Board's counsel insists that a fact took place

* It is natural that this mistake should have been made because *the same mistake of fact was in the opinion of the Circuit Court of Appeals.*

because the Board says it took place. However, nowhere in the testimony of the witnesses or in the original hearing is there any evidence whatsoever to this effect.

This is an extremely important mistake, as will hereinafter be shown.

In the final pages of the brief, we find the issues greatly narrowed.

On page 23 of the brief, the Board's counsel states as follows:

> "And like the Board the court below too deemed it unnecessary to decide whether the employer's conduct during the term of the 1945 contract constituted an unfair labor practice. It pointed out that the alleged 'unseasonableness of the demand of May 2, 1945' could not dispose of the case because 'the demand for the information was renewed later during the negotiations for the 1946 contract.* Moreover, the constant position of (the employer) has been and now is that merit increases are not, under the National Labor Relations Act, a proper subject for collective bargaining; * * *."

Thus we find the controversy in this case narrowed as follows:

1. The Board does not insist—and claims that neither the Board nor the Court below insisted—that it was unlawful for this employer to refuse to furnish the list in question in May, 1945. This question is definitely pretermitted—although we had been under the impression that the court below did not pretermit it. In any event, by the admission of counsel in their brief, its pretermission is now conceded.

2. The Board insists that the real basis for the finding of a refusal to bargain was *the refusal to furnish the information during the formulation of the 1946 contract.* This is a purely factual basis, and if the facts existed to

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* But it was not!

sustain it, we are quite frank to say that we think the Board would be correct. However, as previously pointed out—there is no evidence whatsoever in the record, except in the opinions of the Board and the court (and that is not evidence!) to sustain this fact.

3. Counsel for the Board goes further and insists that ultimately the true basis for the finding of a refusal to bargain is *the attitude of this employer*. In other words, they insist that the real crime committed by this company *was its attitude*. But we respectfully submit that a finding of a commission of an unfair labor practice must be based upon objective fact, and not merely upon an attitude.* It must be based upon the commission of an act, or the refusal to commit an act, and not merely upon what the Board assumes to be a mental state.

None of the cases cited by counsel for the Board is even remotely in point, as the facts and circumstances in those cases are totally different from those of the case at bar.

We insist that the brief in opposition demonstrates all the more forcefully the necessity for a consideration of this important case by this Honorable Court.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,
For Petitioner.

CHAMBLISS, CHAMBLISS & BROWN,
Of Counsel.

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*Especially when the attitude that is assumed to exist did not actually exist!

This employer did feel that *under the existing contract* it could grant merit increases without consulting with the union. But it also recognized that at the time of negotiating a contract, the union was (a) entitled to a list of merit increases that had been granted; and (b) entitled to bargain for a contract that would make merit increases throughout the year *contractually* subject to bargaining.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 69

J. H. ALLISON & COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below (R. 128-138) are reported in 165 F. 2d 766. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 33-39, 16-30) are reported in 70 N. L. R. B. 377.

JURISDICTION

The decree of the court below (R. 127) was entered on January 26, 1948. By orders entered on

April 9, 1948 (R. 141) and May 20, 1948 (R. 140) by Mr. Justice Reed the time within which the petition for a writ of certiorari might be filed was extended for forty days. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that the refusal of an employer to bargain with the exclusive bargaining representative of its employees upon request respecting individual merit wage increases constituted a refusal to bargain collectively within the meaning of Section 8 (5) of the Act.

The following additional questions are urged by petitioner but we believe that they are not presented by the record in this case:

1. Whether a court may enforce an order of the Board upon grounds other than those set forth by the Board in its decision.

2. Whether the Board may properly base its finding of an unfair labor practice upon events occurring subsequent to the filing of the charge and the issuance of the complaint, where such events are a continuance of the unfair labor practice alleged in the charge and the complaint.

3. Whether the Board may properly find that an employer has committed an unfair labor practice because during the negotiation of a contract with

the exclusive bargaining representative of its employees the employer declined to assent to a demand of the bargaining representative which demand was thereupon withdrawn and the contract signed without its inclusion.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 29-32.

STATEMENT

Upon a charge duly filed by the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 402, A. F. of L., hereinafter called the Union, the Board on December 10, 1945, issued its complaint alleging that J. H. Allison & Company, hereinafter called the employer, had on or about May 2, 1945, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of all the employees in an appropriate unit with respect to merit increases in rates of pay and wages (R. 11-14). The employer filed an answer denying that it had so refused to bargain (R. 14-15). A hearing upon the complaint was held before a trial examiner of the Board on January 21, 1946 (R. 40). On February 8, 1946, the trial examiner issued his intermediate report (R. 16-30) in which he made the following findings:[1]

[1] In the following statement, the references preceding the semicolon are to the trial examiner's findings; succeeding references are to the supporting evidence.

The employer has recognized the Union as the exclusive collective bargaining representative of its employees in an appropriate bargaining unit [2] and has operated under successive contracts with the Union since 1941 (R. 19; 58, 80). These contracts provided for recognition of the Union as exclusive bargaining representative, a form of closed shop, and numerous provisions with regard to hours of work, vacation pay, and other matters not material here (R. 19; 53, 56, 60, 66, 87, 108, 122-124, Bd. Exhs. 3, 4). With regard to wage rates, the contracts provided only for minimum wage scales (R. 19; 53, 56, 122-124). Many of the employees, however, in accordance with their respective skills, were paid higher than the minimum rates (R. 19; 66-68, 70-71). From time to time, the employer and the Union bargained concerning the actual wage rates to be paid to particular classifications of employees and came to oral agreements with respect thereto (R. 19; 62, 67, 70-71, 73-74, 96-97).

Sometime in 1944, the Union filed with the National War Labor Board a request for a general wage increase of 14 cents an hour (R. 19; 63, 71, 99-100). On March 28, 1945, the Regional War Labor Board for the area denied the Union's application (R. 19; 63-65, 89, 98-100, 125-126). Shortly thereafter the employer unilaterally, without con-

[2] The employer stipulated (R. 12-13, 49), and the trial examiner found (R. 18), that the appropriate unit consisted of all production workers, with certain specified exceptions, and that the Union, at all times pertinent, was the duly designated bargaining representative of such employees.

sultation with either the Union or with individual employees, gave approximately thirty-one employees individual wage increases of from one to three cents an hour (R. 19-20; 51-53, 72. 78, 84, 86, 89, 90-91).[3] The individuals receiving the increases learned about them for the first time when the increased amounts appeared on their pay checks (R. 21; 91, 106). At the time of the hearing, there were approximately 110 employees in the appropriate unit (R. 19, n. 1; 96). The employer designated these increases as "merit" increases (R. 19-21; 84, 86, 94, 98), and asserted that such an increase is "based on an individual's performance of his duties; one that is based on his regularity, his loyalty, his willingness to come out and maybe work when things get tight" (R. 20-21; 86), that "an individual merit increase is a reward for increased production or skill" (R. 21; 98). The employer has never issued any statement of policy to the employees generally concerning these merit increases or the basis on which they are made (R. 21, n. 2; 97).

The union representative, upon hearing of these increases, on May 2, 1945, asked the employer to

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[3] The employer explained that the reason it gave this large number at this time was that after the Union filed the application for a 14 cent wage increase in August 1944 all granting of merit increases had been held in abeyance because of the realization that if the War Labor Board approved the Union's application it might have to grant a general increase of 14 cents or part thereof, but when the application was denied it put into effect all the merit increases which would otherwise have been granted during this period (R. 99, 100).

furnish the Union with a list of the employees who had received the increases, and the amounts thereof (R. 19; 52, 92). He told the employer at the time that such information was necessary as a basis for further collective bargaining negotiations on wage rates (R. 19-20; 52-53, 54, 106).[4] The employer refused to furnish this information (R. 20; 52, 53, 54, 63, 78, 94-95). Subsequently, the employer and the Union jointly filed with the War Labor Board an application for approval of an increase in the rate ranges paid to various classifications of employees (R. 20; 63, 66, 88). The War Labor Board approved this application (R. 20; 66, 88), and immediately thereafter the employer unilaterally, and again without notification to the Union, granted further increases to individual employees (R. 20; 88-89, 92-93, 100-101).[5] The Union on several occasions requested the employer to furnish it with information as to these increases but its requests were all refused by the employer (R. 20; 54-56, 78-79, 92-93). The exclusion of the Union from collective bargaining about these increases

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[4] Not only had it been customary for the employer and the Union during the term of the contract to bargain about actual rates paid to employees in excess of the minimums fixed in the contract (R. 19; 62, 67, 70-71, 73-74, 96-97), but the contract expressly provided that twice in any year either party might request a modification of the existing wage structure (R. 53, 56, 122-124).

[5] The employer asserted that only four or five merit increases had been granted between May 1945 and the time of the hearing in January 1946, attributing this small number to the fact that during this period it had put into effect a general wage increase (R. 101).

had a serious effect on the Union's prestige and status because the granting of wage increases to some employees but not to others produced resentment and unrest within the ranks of the Union (R. 22; 52-53, 57, 105-106).[6]

During negotiations leading to the execution of a collective bargaining contract on January 7, 1946, the Union requested the employer to agree to the inclusion in the contract of a clause which would insure the right of the Union to be consulted and informed with regard to merit increases or any other "changes in wages, or material changes in working conditions" so that the Union might be able to bargain with the employer respecting such changes (R. 20, 24; 55, 85-86, 89, 93, 105). The employer refused to agree to the insertion of such a clause and the contract was executed without it (R. 20, 24; 55, 86, 89, 93).[7]

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[6] Some employees even attempted to get the Union to go on strike for the purpose of requiring the employer to inform and consult the Union on merit increases (R. 57).

[7] The union representative testified that the omission of the clause from the contract was based on the express understanding of both the employer and the Union that the respective rights and duties of the parties with regard to merit increases would be determined in this case which was at that time already pending before the National Labor Relations Board (R. 55-56). The Union made it clear that it was not abandoning its position that it had the right to be notified and fully informed of, and bargain about, all merit increases (R. 55-57). The employer representative at the hearing testified he did not "recall" that the Labor Board case was referred to at those conferences (R. 93). The Board found that after the employer refused the Union's request, "The Union then dropped its request, stating that the matter would probably be settled in the proceedings which it had instituted before the Board" R. 34.

Throughout its conferences with the Union and at the hearing before the Board, the employer took the position that merit increases were not a subject about which it was required to bargain collectively and that accordingly the Union was not entitled to be notified, consulted or informed with regard to the number of such increases, their amount or the persons to whom they were granted (R. 20-22, 24; 52, 83-84, 86, 92, 95, 98-99, 119). The employer admitted that whenever the Union or any individual requested a wage increase, it was under a duty to bargain with the Union in respect thereto, but maintained that it had the right in its sole discretion at any time to grant individual increases which were based on its estimate of the worth of the employee and were not negotiated with either the Union or the individual employee (R. 20-22, 24; 83-84, 86, 92, 95, 98-100). The employer also insisted it had the right to withhold from the Union all information as to changes in wage rates made in this manner (R. 20, 22; 45-47, 78, 90).[8] It asserted that, since the Union had a closed shop,

[8] At the time of the hearing before the Board the employer had not yet furnished information to the Union respecting any of the merit increases (R. 56, 71-72) and the Union did not know how many had been given, to whom, or their amounts (R. 72). When Board counsel requested a subpoena for the employer's records or a list of the merit increases in order to prove the instant case, the employer objected on the ground that "the actual furnishing of the list is the very thing, the propriety of which is to be tested in this case" (R. 45-47, 78, 90-91). The employer thereafter stipulated in general terms that it had granted merit increases and the request for the subpoena was denied (R. 78-79).

all the individuals to whom increases were granted were members of the Union and that the Union should get its information as to the increases from them (R. 22; 53, 94). The employer's vice president admitted that he realized some employees might not desire to let the Union know they had received an individual increase in pay (R. 22; 94).[9]

The trial examiner ruled that the Act imposes on an employer the obligation to consult with the duly designated bargaining representative prior to making changes in wage rates and that there was no basis for drawing a distinction between different types of wage increases and holding that some are subject to collective bargaining while others remain a management prerogative (R. 24). He accordingly found that the employer's denial throughout its entire negotiations with the Union that it had an obligation to bargain about merit wage increases and its continued insistance that such increases were matters solely within its discretion, to be resolved by it and by it alone, constituted a refusal to bargain collectively (R. 24). He further found that since merit increases were a proper subject for collective bargaining, it was

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[9] The stenographic notes of the conference between the employer and the Union on July 18, 1945, show that the employer's vice president, McCall (R. 20, 80), used as an excuse for not giving the Union the list requested that some of the employees "don't care about having what they make broadcast and made public information" (R. 94). At the hearing the employer argued that in view of the Union membership of each employee who received an increase, the notice to the employee was notice to the Union (R. 95, cf. 85).

the responsibility of the employer to furnish the Union information respecting these increases (R. 22). He therefore concluded that the employer had committed unfair labor practices in violation of Section 8 (1) and (5) of the Act (R. 24-25, 26-27).

The employer thereafter filed exceptions to certain of the findings of fact, conclusions of law and recommendations contained in the intermediate report (R. 30-32). It did not except on the ground that certain of the findings were based on events transpiring subsequent to the date of the issuance of the complaint or otherwise exceeded the scope of the pleadings.

The Board on August 26, 1946, issued its decision and order in which it adopted the findings, conclusions and recommendations of the trial examiner with certain exceptions, additions and modifications (R. 33). The Board agreed fully with all the trial examiner's findings respecting the events which he described in his intermediate report. And it also agreed with his conclusion that the employer was required to bargain with the Union as to merit increases (R. 34-35). It stated (R. 34):

> * * * we agree with the Trial Examiner that the [employer] has not fulfilled its obligation to bargain collectively with the Union. We find no merit in the [employer's] contention that merit increases are a prerogative of management. Like the Trial Examiner, we

> are of the opinion that merit increases are an integral part of the wage structure, and as such, constitute a proper subject for collective bargaining.

The only material respect in which the Board departed from the trial examiner's findings and conclusions appears in the following two sentences of its decision (R. 34-35):

> * * * In concluding that the [employer] has violated its duty under Section 8 (5), however, we find it unnecessary to determine whether the [employer] was under an obligation to bargain concerning merit increases during the term of the 1945 contract which the Union had entered into without provision therein for merit increases in the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years. We base our finding of a refusal to bargain upon the [employer's] failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper subject of collective bargaining, and upon the [employer's] continuing refusal to furnish to the Union information concerning merit increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases.

The Board ordered the employer to cease and desist from refusing to bargain collectively with the Union with respect to merit wage increases,

upon request so to bargain with the Union, upon request to furnish the Union full information with respect to merit wage increases, including the number of such increases, the amount of such increases, and the standards employed in arriving at such increases, to refrain from granting merit wage increases without prior consultation with the Union, and to post appropriate notices (R. 35-38). Board member Reilly dissented (R. 38-39).

The Board filed a petition for enforcement of its order in the court below (R. 1-5), and on January 26, 1948, the court, with one judge dissenting, handed down its opinion (R. 128-138) and entered its decree (R. 127) enforcing in full the Board's order. It agreed with the Board that "by virtue of the National Labor Relations Act the obligation of the employer to bargain collectively with representatives of its employees with respect to wages, hours and working conditions, includes the duty to bargain with such representative concerning individual merit increases. The labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining" (R. 132). The court pointed out that, irrespective of whether the Union's demand during the term of the 1945 contract was unseasonable, by renewing its demand during negotiations for the 1946 contract, the Union had adequately asserted its claim to bargain

about merit increases (R. 131). The court also ruled that in view of the employer's continued insistance that it would not negotiate or bargain with the Union about merit wage increases until ordered so to do, the Union did not waive its rights to bargain about such increases by entering into a contract which was silent upon this controverted matter (R. 131).

ARGUMENT

1. The decision below that the National Labor Relations Act imposes on an employer the obligation to bargain collectively with respect to individual merit wage increases is in accord with principles recognized in (R. 132-137) decisions of this Court and of the Circuit Courts of Appeals. There are no conflicting decisions. There is, therefore, no need for further review.

Quite apart from the uniform decisions of this and other courts, the language of the Act itself affords full support for the decision of the Board and the court below. Section 9 (a) provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

The employer's position in this case, asserted in all conferences with the Union (R. 52, 54-55, 63, 94-95), at the hearing before the Board (R. 83-84, 86, 94-95, 98-99, 119), and in the court below (R. 131-132), has been that the statute did not contemplate that all rates of pay and wages should be the subject of collective bargaining but only those adjustments in pay rates which the employer was willing to "negotiate" or "compromise" (R. 98), not those which the employer increased as a "gratuity" (R. 119, 132) based on the "merit" (R. 83, 132) of an employee. The Act, however, contains no such exception. And this Court in its decisions has made it clear why no exception is to be implied for either unilateral employer action or the granting of special advantages to individual employees. In *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, this Court held that an employer committed an unfair labor practice when it unilaterally, without consulting the bargaining agent, requested permission from the National War Labor Board to increase wages. There this Court stated (at pp. 384-385):

> * * * Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. * * *
>
> * * * Such unilateral action minimizes the in-

> fluence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

Earlier this Court had rejected employer contentions that benefits granted employees justified disregard of the bargaining agent. In *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, this Court pointed out (at pp. 338-339):

> * * * The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. * * * advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.

In *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U. S. 342, this Court, in finding that the employer's change in the wage rates of certain individual employees constituted a violation of the duty to bargain with the collective agent imposed by the Railway Labor Act, stated at pp. 346-347):

> exceptional situations often have an importance to the whole because they introduce

> competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the union to be consulted and to bargain about the exceptional as well as the routine rates * * *

Similarly, see *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678. The holdings of the various Circuit Courts of Appeals are uniformly in accord: *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. 2d 131, 137 (C.C.A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Louisville Refining Co.,* 102 F. 2d 678, 680-681 (C.C.A. 6), certiorari denied, 308 U. S. 568, enforcing 4 N. L. R. B. 844, 859-861; *Oughton* v. *National Labor Relations Board,* 118 F. 2d 486, 492-493, 498 (C.C.A. 3), certiorari denied, 315 U. S. 797; *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 487 (C. C. A. 7); *Consolidated Aircraft Corp.* v. *National Labor Relations Board,* 141 F .2d 785, 787 (C.C.A. 9).

The record in this case shows a particularly flagrant instance of an employer's refusal to permit the bargaining agent to participate in determining the wage structure. Individual increases were here granted to approximately a third of the employees in the unit—thirty-six out of some one hundred and fifteen employees (R. 19-20; 90, 93, 100) without participation or even notice to the Union. At the

hearing the employer impliedly conceded the relation of these increases to the general wage structure by explaining that the thirty-one increases granted following the denial by the War Labor Board of the Union's application for a 14 cents an hour wage increase would not have been given if a general wage increase had been put into effect (R. 99, 100), and that only four or five were granted during the succeeding half year because of a general wage increase during that period (R. 101). As the employer was aware, the granting of increases to some employees and not to others caused resentment and unrest among the employees (R. 22; 52-53, 57, 105-106). There were even employees who seriously urged the Union to call a strike because of this conduct of the employer (R. 57).[10] Yet the employer never explained either to the employees or to the Union the policy or basis upon which these increases were granted (R. 21, n. 2; 97). Moreover, the employer during negotiations of a subsequent collective bargaining agreement refused to agree to the insertion of a clause which would have recognized the right of the Union to be informed and bargain about all changes

[10] Students of labor-management relations in studying the effect of unilateral action by employers in disregard of the duly designated bargaining representative have found that unilateral conferrals of benefits have been productive of strikes. Chamberlin, Neil, *The Nature and Scope of Collective Bargaining*, 58 Quar. Journ. Econ. 375-376, ns. 3, 4 (May 1944); Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (Harpers, 1942), pp. 100-101; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), pp. 553, 680-681, 799-800.

in pay (R. 55, 85-86, 89, 93). The employer insisted then, and at all times since has continued to insist, that it has the right to make such individual changes in pay rates in the future as it has in the past in complete disregard of the Union (R. 94-95, 131-132).

In this Court the employer argues that these increases are merely "gifts" to its employees and that there is no law which imposes on the employer a duty to bargain about the gifts it may desire to make (Pet. 15-16). But these increases are unmistakably compensation for services. Once granted, they become part of the employer's obligation to the employee. For each hour that he works thereafter the employer is legally required to pay at the new rate. The employee could sue and recover should the employer without notice to the employee at any time decide to omit the amount of the increase from future pay checks. If the increased amount was actually a gift no such legal result would ensue. As the court below stated (R. 132):

> The labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining.

Nor can the employer validly contend that because the wage increases were based on the merit

of the employee no useful function could be served by the employees' bargaining agent in connection therewith. Certainly, the Union could make suggestions for the setting of standards which would enable all employees to compete for such raises on an even footing and with full knowledge of what was expected of them, thereby diminishing the tensions and dissatisfactions which flow from a policy of individual wage adjustments which are based upon undisclosed and uncertain standards.

Upon this record there can be no doubt but what the Board and the court below correctly held that the employer had refused to bargain collectively in violation of Section 8 (5) of the Act. No difficult or novel questions lurk in this holding. It is in full accord with the language of the Act and with the established and uniform precedents of this and other courts.

2. We believe that the foregoing question is the only one urged in the petition which is properly presented by the record in this case. The employer's question numbered "(1)", "Can the Circuit Court of Appeals grant an enforcement order to the National Labor Relations Board on grounds other than those cited by the National Labor Relations Board in its findings?" (Pet. 2), is based on an inaccurate reading of the decisions of both the Board and the court below. In fact the opinion of the Board and the court are entirely clear and unambiguous. There is not the slightest basis for

any doubt but what the court below fully approved the grounds upon which the Board based its decision and added no additional or different grounds.

The employer begins its analysis by labeling as Grounds One and Two, what it asserts were in "effect" the grounds of the trial examiner's ruling (Pet. 5). Ground One it states was the refusal "to furnish the list in May 1945" and Ground Two the refusal "to include a clause making merit increases the subject of bargaining in the 1946 contract" (Pet. 5). However, it was neither the refusal to furnish the list nor the refusal to insert the clause requested, as such, which the trial examiner found constituted the refusal to bargain. Rather it was the employer's refusal to observe the obligation which the Act imposes on it to consult with and inform the Union prior to making changes in wage rates. The trial examiner so expressly states twice in his intermediate report. Thus, he concludes the section of the intermediate report entitled "The unfair labor practices" with the following finding (R. 24):

> * * * [The employer's] denial throughout its entire negotiations with the Union that such an obligation existed and its continued insistence that this problem of merit increases was a matter solely within the discretion of the [employer], to be resolved solely by it and it alone, constituted a refusal to bargain, and the undersigned so finds.

Then again in the section of the intermediate report entitled "The remedy" he refers to his earlier finding as follows (R. 25):

> It has been found that the [employer] has refused to bargain with the Union by its insistence, despite the Union's request to be consulted on this subject, that the subject of merit increases was not a matter for collective bargaining and one in which it could act completely unilaterally without consulting with the Union.

The employer continues its analysis by measuring the decision of the Board and the court below in terms of their supposed treatment of what the employer has asserted were Grounds One and Two of the trial examiner's ruling (Pet. 6, 8-9, 10, 11-12). It accuses the Board of abandoning the trial examiner's Ground One and of basing its decision solely on his Ground Two (Pet. 6, 8, 9, 11, 12). But the Board neither disagreed with the trial examiner that the employer had a duty to inform the Union of all its changes in wage rates nor agreed with any supposed finding that the refusal to include a clause on merit increases in the 1946 contract constituted a refusal to bargain. It fully agreed with the trial examiner that the employer had a duty to bargain with the Union about merit increases which included an obligation to inform the Union fully of all merit increases. Where the Board differed with the trial examiner was in its

failure to rule as to whether the employer's refusal to bargain about merit increases and to inform the Union in respect thereto during the term of a contract dealing with wages but silent on the issues in dispute constituted an unfair labor practice. Whereas the trial examiner found that the assertion by the employer of its position as to merit increases on May 2, 1945 constituted a refusal to bargain (R. 24-25, 26), as did its subsequent assertions of this position on numerous occasions thereafter (R. 24-25, 26), including its assertions during the negotiations for the 1946 contract (R. 20, 24, 26), the Board based its findings of a refusal to bargain only on the employer's assertion of its position during the negotiations for the 1946 contract and thereafter (R. 34-35). The Board stated (R. 34-35):

> In concluding that the [employer] has violated its duty under Section 8 (5), however, we find it unnecessary to determine whether the [employer] was under an obligation to bargain concerning wage increases during the term of the 1945 contract which the Union had entered into without provision therein for merit increases in the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years. We base our finding of a refusal to bargain upon the [employer's] failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper

> subject of collective bargaining, and upon the [employer's] continuing refusal to furnish to the Union information concerning merit wage increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases.

The employer in measuring the decision of the court below in terms of its treatment of Grounds One and Two, asserts that the court based its holding on both Grounds One and Two, thus differing from the Board which supposedly adopted only Ground Two (Pet. 8, 9-10, 11, 12). But the court below did not adopt either Ground One or Ground Two as defined by the employer (Pet. 5), any more than did the Board. And like the Board the court below too deemed it unnecessary to decide whether the employer's conduct during the term of the 1945 contract constituted an unfair labor practice. It pointed out that the alleged "unseasonableness of the demand on May 2, 1945" could not dispose of the case because "the demand for the information was renewed later during the negotiations for the 1946 contract. Moreover, the constant position of [the employer] has been and now is that merit increases are not, under the National Labor Relations Act, a proper subject for collective bargaining; and that the company will not negotiate or bargain with the union upon the subject until 'ordered so to do by final authority' " (R. 131). The

court below accurately recited the grounds for the Board's decision. It pointed out that (R. 130):

> * * * The refusal of [the employer], during the formulation of the 1946 contract, to negotiate with the union concerning merit wage increases and to furnish information upon the subject so that the union could adequately represent the employees, was declared to be the basis of the Board's finding that [the employer] had refused to bargain within the meaning of section 8 (5) of the Act.

The rest of the court's opinion (R. 130-137) is devoted to answering the attacks made on this holding and to demonstrating that it is fully supported by authority. At no place in its opinion does the court suggest either expressly or impliedly any disagreement or deviation by it from the grounds given by the Board.

We believe, therefore, that the employer's question numbered "(1)" as set forth in its petition (p. 2) is not presented by the record in this case.

3. The employer's question numbered "(2)", "Under the National Labor Relations Act, can an employer be found guilty of an unfair labor practice on the basis of facts which occurred after the filing of the charge and the issuance of the complaint, but before the hearing of the case?" (Pet. 2), is likewise not properly before this Court. This question is based on the employer's contention that the Board could not properly base its decision

on events occurring during the negotiation of the 1946 contract because these events occurred subsequent to the filing of the charge and complaint (Pet. 12-13). When evidence respecting the negotiation of the 1946 contract was introduced the employer did not object thereto (R. 55, 85-86, 89, 93). Although the trial examiner in his intermediate report made findings with respect to the negotiations for the 1946 contract and based his determination that the employer had committed an unfair labor practice in part on these findings (R. 20, 24-25), the employer in its exceptions to the intermediate report included no challenge to these findings on the ground that they were based on events occurring subsequent to the charge and complaint (R. 30-32). Section 10 (e) of the Act precludes consideration by a court of an objection that has not been urged before the Board. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. Nor was this question argued or even mentioned in the employer's brief filed in the court below.

Moreover, the findings based on the events occurring during the negotiation of the 1946 contract were clearly within the scope of the complaint. It alleged that "On or about May 2, 1945, and at all times thereafter, [the employer] did refuse and continues to refuse to bargain collectively with the Union * * * with respect to merit increases in rates of pay and wages" (R. 13). The findings of

events during the negotiation of the 1946 contract showed a continuing refusal after May 2, 1945, to bargain respecting merit increases.

4. The employer's question numbered "(3)", "Is an employer guilty of refusal to bargain with a union when, in the negotiation of a contract, the union makes a demand to which the employer declines to assent, and the union then withdraws the demand and proceeds to execute a contract?" (Pet. 2), again assumes that the Board and the court below ruled that the employer was guilty of an unfair labor practice because it refused to include in the 1946 contract the clause requested by the Union (Pet. 5, 6, 13-14). Neither the trial examiner, the Board, nor the court below so much as suggested that the employer was under any obligation to include the clause requested in any contract or that its refusal so to do constituted an unfair labor practice. It was rather the employer's adamant position that the subject matter dealt with in the requested clause, namely, merit increases, was not within the scope of collective bargaining, which was found to constitute the refusal to bargain (R. 24, 25, 34-35, 131). The refusal to include a given clause or even any clause at all on the subject is obviously an entirely different thing from the refusal even to consider or negotiate about a clause on the ground it deals with a subject about which the employer refuses to bargain.

The employer's question numbered "(3)" also assumes that the Union withdrew its demand for bargaining about merit increases. The record does not support such an assumption. Nor is a withdrawal to be implied because the Union signed the contract without the requested clause. As the Board found (R. 34), when the Union signed the contract without the clause it pointed out to the employer that the issue of its right to bargain about, and be informed as to, merit increases was then pending for decision before the Board (R. 55-57). Instead of indicating any abandonment of its rights, this shows that the Union was willing to abide by orderly legal processes to determine its rights. And the court below very correctly noted that any interpretation of the Union's conduct as a withdrawal of its demand would mean that unions must refrain from signing contracts in order to preserve their position, a result which "would seem to be disruptive rather than fostering in its effect upon collective bargaining" (R. 131).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any new or novel questions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel;
DAVID P. FINDLING,
Associate General Counsel;
RUTH WEYAND,
Acting Assistant General Counsel;
National Labor Relations Board.

JULY, 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial dis-

putes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person,

and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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MOTION FILED DEC 15 1948

In the Supreme Court of the United States

OCTOBER TERM 1948.

No. 69.

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION FOR LEAVE TO FILE PETITION TO RECONSIDER OUT OF TIME
and
PETITION TO RECONSIDER.

JOHN A. CHAMBLISS, JR.,
Provident Building,
Chattanooga, Tennessee,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8847

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Respondent.

MOTION FOR LEAVE TO FILE PETITION TO RECONSIDER OUT OF TIME.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes J. H. Allison & Company through its counsel and moves the Court to allow it to file a motion to reconsider the action of the Court in denying petition for certiorari in this cause, despite the fact that the time for filing the petition had expired, this motion being based on the following grounds:

Counsel for petitioner, being inexperienced in practice before this Honorable Court, was under the impression that the old rules allowing twenty-five (25) days within which to file a petition to rehear were still in effect. The original of this petition was duly filed within the twenty-five day period, but counsel was at that time advised by the Clerk of the Court that the rules had been changed

and that the time limit was now fifteen (15) days and that the only way in which the petition could be filed would be on motion to file it out of time.

As pointed out in the petition to reconsider, this case involves questions of great moment and consequence which have never before been passed on by this Court. The law is left in an extremely muddled condition unless this Court consents to hear this case and to clarify the legal matters involved. Furthermore, unless counsel for the appellee can answer the question which is raised in the latter part of the petition, it is apparent that the case will have been decided on factual grounds *which did not exist*. This is plainly and flagrantly violative of the Wagner Act under which this suit was brought.

And I, John A. Chambliss, Jr., counsel for petitioner, do hereby certify that this motion and the petition to which it relates are presented in good faith and not for delay.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,

Counsel for J. H. Allison & Company.

In the Supreme Court of the United States

OCTOBER TERM 1948.

No. 69.

J. H. ALLISON & COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION TO RECONSIDER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. H. Allison & Company, files this its petition to reconsider, and respectfully shows the following:

I.

Heretofore, and on Monday, October 11, 1948, this Honorable Court entered its order denying this petitioner's petition for writ of certiorari to the Sixth Circuit Court of Appeals.

II.

Petitioner is aggrieved by the action of the Court and files this petition to reconsider within the time allowed by law and the rules of this Honorable Court, basing said petition upon the following grounds:

1. The matter involved in this cause is of great national importance and has never been passed upon by this Honorable Court.

2. There is such ambiguity and confusion in the opinion of the Sixth Circuit Court of Appeals (which automatically becomes the law of the case in the absence of the granting of a petition for certiorari by this Honorable Court) that neither the petitioner nor the National Labor Relations Board nor the general public can tell what the law is.

These two grounds will be discussed separately.

FIRST GROUND.

The matter involved in this cause is of great national importance and has never been passed upon by this Honorable Court. The whole system of free enterprise in the United States depends upon a proper preservation of individual rights.

It is quite true that as our society has become more industrial in nature, certain individual liberties have been subordinated to collective effort. As Elihu Root declared:

> "And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose."

At the same time, it is the function of this Honorable Court to see that, except in so far as is necessary, the rights of individual conduct are preserved.

To deny an employer—as in the case at bar—the right to give individuals unsolicited pay increases—and to deny those employees the right to receive such increases—where there is no element of subverting the union or of modifying the basic contractual wage structure, plunges the poisoned dagger of collectivism into the heart of our system of economics.

We feel that the Court has not fully realized the tremendous national importance of the decision in this case. As indicative of its national importance—and for no other

purpose—we have assembled in our appendix to this brief some of the comments of the more important national publications. These are cited merely to show the urgency of having a clear-cut definition of the rights and liabilities in this case.

It is of the utmost importance that this Court assume jurisdiction, grant the petition, and settle the very basic questions presented.

SECOND GROUND.

There is such ambiguity and confusion in the opinion of the Sixth Circuit Court of Appeals (which automatically becomes the law of the case in the absence of the granting of a petition for certiorari by this Honorable Court) that neither the petitioner nor the National Labor Relations Board nor the general public can tell what the law is.

A careful reading of the majority opinion by the Sixth Circuit Court of Appeals in this case leads to such confusion as can only be remedied by a decision of this Court.

Briefly stated, the opinion of that Court points out that this company and its union had had collective bargaining agreements for some five years, and that this agreement called for a union shop—that is, all the employees belong to the union. During 1945 (when the dispute arose) the contract between the company and the union provided for a minimum wage scale, and there was no provision therein for merit increases. Some months after the execution of this contract, and in conformity with the practice that had obtained for many years, the company gave unsolicited increases to some of its employees, without bargaining relative thereto with either the employees or the union. Thereupon a union official requested that the company give the union a list of the names of the employees who had received these increases.

This request was refused, the company's vice-president pointing out that *under the existing contract* there was no

obligation to furnish such a list at such a time, i.e., in the middle of a contract year, and when no wages were being negotiated.

The opinion goes on to say that during the negotiations for the 1946 contract—which was negotiated subsequent to the filing of the charge, the issuance of the complaint, and the answer of the company—the union requested the company to include in the new contract a clause concerning the union's rights with respect to merit increases and other changes in wages, but that the company representatives stated that the company did not wish to include such a clause, and the union then "dropped its request."

The Court's opinion then stated that the Board had held that *the refusal of respondent during the formulation of the 1946 contract to negotiate with the union concerning merit wage increases and to furnish information upon the subject constituted a refusal to bargain.* (Thus it is quite apparent that the Board based its ruling exclusively upon what took place during the formulation of the 1946 contract.)

In spite of this, the Court goes on to say that "the union, as collective bargaining agent, may not be ignored by refusal of the employer to furnish information as to the basis of such increases, or the names of those receiving betterments in the wage scale and the amounts of the increased wages received by them."

It will be noted that the Court does not say that such refusal is illegal merely *during the formulation of a contract. The distinct impression is given that the company violated the Act in its refusal to furnish the list in May 1945.*

But this cannot be valid, *since that issue was not even before the Court, having been pretermitted by the Board!*

As conclusive evidence that such is so, we quote from the brief of the Board itself on the petition for certiorari to this Court, where on page 21 the following appears:

"Where the Board differed with the trial examiner was in its failure to rule as to whether the employer's refusal to bargain about merit increases and to inform the Union in respect thereto during the term of a contract dealing with wages but silent on the issues in dispute constituted an unfair labor practice. Whereas the trial examiner found that the assertion by the employer of its position as to merit increases on May 2, 1945, constituted a refusal to bargain (R. 24-25, 26), as did its subsequent assertions of this position on numerous occasions thereafter (R. 24-25, 26), including its assertions during the negotiations for the 1946 contract (R. 20, 24, 26), *the Board based its findings of a refusal to bargain only on the employer's assertion of its position during the negotiations for the 1946 contract and thereafter* (R. 34-35)."

Yet witness the confusion of interpretation shown in the Appendix!

And furthermore, observe that the notice now furnished the Company by the Board (and included in the Appendix) calls for (1) bargaining with the union as to merit increases *at any time* the Union requests; (2) furnishing a list of merit increases *at any time*, whether a contract is being negotiated or not; and (3) refraining from granting merit increases *at any time* without prior consultation with the Union. How can this be said to be compatible with the opinion of the Board?

There are two questions before this Court.

The first question—purely a question of law—is whether the company refused to bargain with the union during the formulation of the 1946 contract when, after one request by the union, it replied in the negative—and the request was then dropped.

The second question is whether there is any basis in law and fact for the statement by the Circuit Court of Appeals that "it should not be overlooked that, according to the record, the demand for the information (that is, the list of merit increases) was renewed later during the

negotiations for the 1946 contract." (Parenthesis ours.)

We respectfully submit that under all the rulings of this Court, the first question must be answered in the negative.

And, as to the second question which involves a mixture of fact and law, we respectfully ask counsel for the Board to **cite that place in the record where it appears that the request for the list of merit increases was made again during the formulation of the 1946 contract.**

If it is in the record—then this petition should be overruled.

If it is not in the record, then under the language of the Act itself, the Board's case is without legal or factual foundation, and this petition should be granted and a writ of certiorari issued to the Sixth Circuit Court of Appeals.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,

Counsel for Petitioner.

APPENDIX I.

From "Time," October 25, 1948.

GOVERNMENT.

Merit?

In thousands of U. S. firms, where union & management bargain out the workers' hour and wage scales, the boss each year rewards outstanding employees with independent merit raises above the scale. Last week the U. S. Supreme Court spiked the practice. Henceforth, said the court in effect, a company whose workers are covered by a union contract must, on demand, consult the union before giving merit raises.

The Supreme Court was sitting in judgment on a lawsuit involving Chattanooga's tiny J. H. Allison & Co. (meat packers). Until three years ago, Allison had considered it sound business practice to boost its best workers' pay above the general union scale. Then it ran up against some unexpected opposition. The company, said Local 402, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., had no right to single out workers for special raises without consulting the union.

When the National Labor Relations Board upheld the union, Allison appealed to the courts. The lower courts upheld NLRB. By refusing to review the decision, the Supreme Court, in effect, approved NLRB doctrine that merit raises are not merely rewards for good work, but also changes in the pay scale, therefore subject to collective bargaining under the Wagner Act.

To many a businessman this looked like sawing one of the strongest props from under the incentive wage system. All businessmen know that merit raises are potent stimulants to good work, particularly in businesses where production cannot be measured by articles produced (e.g., on newspapers, on the stage and in offices). The decision

affected new as well as old employees. Labor experts now wondered whether an employer, for example, could still legally hire new help at more than the contract minimums unless the union was consulted.

Furthermore, it was plain to legal eagles that the ruling also affected non-union employees; under the Wagner and Taft-Hartley laws a union with a majority in the shop is the bargaining agent for all employees, whether they belong to the union or not. Said the New York Times: "The principle (established by the court) is a hazardous one in any kind of a free enterprise economy—free enterprise for the employee, as well as the employer. It takes from the resourceful employee * * * his chance individually to increase his earnings."

HERE'S QUESTIONS, ANSWERS GIVEN BY NLRB ON ALLISON MERIT RAISE CASE.

By James Marlow

Washington, Oct. 14 (AP). Can an employer grant a merit raise to an employe without consent of the union representing his workers?

There may be confusion over that question because of action on it by the U. S. Supreme Court this week.

This will explain what can and can't be done under Government law. The information here is from the National Labor Relations Board (NLRB).

To understand it, go back a bit.

A company in Tennessee (J. H. Allison & Co. of Chattanooga) had been signing a contract every year with a union of its employes. The contract covered rates of pay.

But the company—in addition to the regular, agreed-upon pay rate given all the employes—gave some of them higher pay in the form of merit raises.

In 1946, when it came time to bargain with the employer about a new contract, the union said: It wanted to bargain not only about the regular pay scale but also about any merit raises the employer might wish to give to some of the employes.

(The labor law says an employer must bargain with a union about wages. But it doesn't say anything about the kind of wages, whether regular rates of pay or merit raises.)

The company refused to bargain. It said the law covered regular rates of pay but did not cover merit raises. The union then complained to the NLRB that the employer was unfair.

(The NLRB is the Government agency which sees that the law is carried out and interprets the law when any question about its meaning arises.)

The NLRB said the boss was wrong. It said merit raises are wages and an employer must bargain about them. (The law doesn't say an employer must agree to what a union wants, when it bargains. But at least he must bargain about wages.)

In this case the company thought the NLRB was wrong and appealed to the U. S. Circuit Court of Appeals to overrule the NLRB. But the court upheld the NLRB.

The Company then took its last step and appealed to the U. S. Supreme Court to overrule the Circuit Court and the NLRB. This week the Supreme Court refused to review—or consider changing—the Circuit Court's ruling.

So the NLRB ruling stands now for all employers covered by the Federal labor law. To repeat, an employer must bargain on merit raises with the union representing his employes if the union wants to.

But at this point other questions arise. This is a roundup of questions and answers, with the answers given by the NLRB.

Q. Can an employer now continue to grant merit increases to his employes if he doesn't have anything about that in his union contract?

A. Yes. Unless an employer has a contract covering merit raises or unless the union wants to bargain about them, he can continue to grant merit increases.

(This is important to remember since some employers may think, because of the NLRB ruling in the case above that they no longer can grant merit increases under any circumstances.)

Q. But what of a case where an employer bargains with a union over merit raises and the bargaining breaks down? Can he then, with the bargaining suspended, go ahead and grant merit increases?

A. Yes, provided he doesn't do it to try to smash the union by winning workers away from it. Of course, if he did grant merit raises after bargaining broke down, the

union might complain to the NLRB that he was doing it to break the union.

Q. Suppose a union represents only a majority of the employes in a place, say, only 51 out of 100. Can an employer give the non-union workers merit raises?

A. Yes, just as he's free to give his union workers raises—provided he has no union contract covering merit raises. But once he signs such a contract, anything in that contract that applies to his union workers applies to his non-union workers too. Why?

Because when a union represents only a majority of workers in a plant, its bargaining covers all the employes, union and non-union alike.

Q. But suppose there's no contract covering merit raises and the boss hands out some. Can the union ask him for a list of those who got the merit raises?

A. Yes. The NLRB says the boss must supply such a list, even though he has done no bargaining and has no contract covering merit raises.

From "Business Week," October 16, 1948.

BARGAIN ON MERIT.

Supreme Court says employers can't give merit pay increases unless union OK's them, accepts other labor cases

"Merit raises" are a matter for collective bargaining—by law. Management cannot give a voluntary increase to individual employees without first taking it up with their union—unless the union contract gives the boss the right to do so.

•Allison Case—The U. S. Supreme Court made this clear in one of several decisions handed down this week. It rejected an appeal by J. H. Allison & Co., a Chattanooga meat packer, against a lower court order requiring that he bargain on merit increases.

In its appeal, the company argued that it is a management prerogative to give voluntary pay boosts to individual employees whenever they are justified. But the court upheld a National Labor Relations Board—and union—contention that wage increases of any kind must be taken up with the union.

•Union Prestige—Basis of the decision: Granting wage increases to some favored employees, and not to others, might undermine the prestige and plant status of a union.

The Allison case was based on provisions of the old National Labor Relations Act; the new Labor-Management Relations (Taft-Hartley) Act did not amend the sections of law involved.

From "Newsweek," October 25, 1948.

COURT:

Ceiling on Merit

Many a person was startled last week to find an employer could no longer give his employees merit raises without bargaining with the union—that is, if the union wanted to be consulted. The Supreme Court seemed to imply as much, not by rendering a decision, but merely by the choice of cases it chose to review.

In the case of J. H. Allison & Co., Tennessee meat packers, the National Labor Relations Board had ruled the company guilty of unfair labor practices for refusing to negotiate with the union on merit pay raises. The Cincinnati Circuit Court upheld the NLRB. The Supreme Court refused to review the case.

Simultaneously the Supreme Court announced it would hear a case involving the Crompton-Highland Mills, Inc., of Griffin, Ga. The company had broken off negotiations with the union, then twelve days later raised wages without further consultation. The NLRB held the company guilty of refusing to bargain collectively, but the New Orleans Circuit Court had overruled it. The NLRB appealed to the Supreme Court to bring the New Orleans court into line.

To many the implication was that the Supreme Court believes that the union must be consulted, if it wishes, on any kind of pay raise, merit or otherwise. "The implications of the decision go to the very heart of a cherished American tradition," said The New York Herald Tribune, "the right of the individual to advance himself by his own efforts."

"The principle is a hazardous one in any kind of free-enterprise economy—free enterprise for the employe as well as the employer," commented The New York Times.

Actually, their concern was untimely: the body was already cold. Under Section 8 (5) of the Wagner Act, it is unfair labor practice for an employer to "refuse to bar-

gain collectively." Although no case has yet been brought under the Taft-Hartley Act, the same section was carried into it without change. And there is plenty of Supreme Court precedent for insisting that all sorts of wage increases are proper subjects for collective bargaining, notably the United Auto Workers-J. I. Case Co. decision (1944) and another involving the Brotherhood of Railroad Telegraphers. There is no obligation for the employer to follow union wishes, but if the union so desires, he must negotiate.

From "New York Times," Wednesday, October 13, 1948.
Editorial, page 24.

"MERIT PAY" INCREASES.

The United States Supreme Court has refused to review a lower court's decision that under the National Labor Relations (Wagner) Act an employer having a contract with the union must not grant pay increases for merit without bargaining first with the union having jurisdiction over the benefited employe. In a separate case on which the Court acted on Monday it agreed to review a decision by another Circuit Court of Appeals that a textile mill did not violate the Wagner Act by increasing wages without notifying officials of the union with whom it had been unable to negotiate an increase.

In both these cases, different though they are in details, the National Labor Relations Board has said in effect that gratuitous pay increases were subject to collective bargaining. And now the highest court in the land has decided to let stand (in effect, upholding) such a finding in the "merit pay" case, and has promised the Board to inquire into the Appellate Court's overruling of the principle in the case.

The principle is a hazardous one in any kind of a free-enterprise economy—free enterprise for the employe as well as the employer. It takes from an employer his right to reward a superior worker with premium pay, to manage his own payroll. It takes from the resourceful employe, whether union member or not, his chance individually to increase his earnings while on his chosen job. This right is not to be confused with the basic and well-recognized right of unions to work for and write into contracts minimum wages for their members. These negotiated rates, because of the great numbers of workers covered, are necessarily filed on a pro rata basis and in terms of medial or average work. They should not preclude individual bargaining where worth, and not favoritism, warrant extra pay.

A National Labor Relations Board spokesman was quoted as saying after the Court's session Monday that the Taft-Hartley Labor Law might make a difference in respect to the policy that all increases are negotiable where there are union contracts. He suggested that a new case would have to be brought under the new labor law to determine whether the principle was applicable only under the old (Wagner) law. By all means, let such a test case be brought soon.

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL bargain collectively upon request with Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 402, affiliated with the American Federation of Labor, as the exclusive representative of all the employees in the bargaining unit described herein with respect to merit wage increases;

WE WILL, upon request, furnish to the above-named union, full information with respect to merit wage increases, including the number of such increases, the amounts of the increases, and the standards employed in arriving at such increases; and

WE WILL refrain from granting merit wage increases without prior consultation with the Union.

The bargaining unit is: all production workers, including truck drivers and drivers' helpers, exclusive of clerical employees, salesmen, guards, and supervisory employees.

J. H. ALLISON & COMPANY
(Employer)

Dated..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

(Seal)

Certificate of Counsel.

I, JOHN A. CHAMBLISS, JR., counsel for petitioner, do hereby certify that this motion and the petition to which it relates are presented in good faith and not for purposes of delay.

JOHN A. CHAMBLISS, JR.